***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 75-1336

*To be argued by*
JEREMY G. EPSTEIN

# United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**Docket No. 75-1336**

UNITED STATES OF AMERICA,
*Appellee,*

—v.—

RICHARD SIMONS,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE UNITED STATES OF AMERICA


THOMAS J. CAHILL,
*United States Attorney for the Southern District of New York, Attorney for the United States of America.*

JEREMY G. EPSTEIN,
JOHN C. SABETTA,
*Assistant United States Attorneys, Of Counsel.*

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### Preliminary Statement

Richard Simons appeals from an order filed in the United States District Court for the Southern District of New York on August 8, 1975, by the Honorable Marvin E. Frankel, United States District Judge, denying his motion pursuant to Title 28, United States Code, § 2255, to vacate the sentence imposed for violation of probation.

### Statement of Facts

Indictment 73 Cr. 799, filed August 16, 1973, charged Simons, Paul Katz, Walter Schwartz, Richard Gallagher, Victor Sawchuk, and Gayle Sherman in Count One with conspiracy to manufacture, distribute, and possess narcotics in violation of Title 21, United States Code, Section 846. Counts Two through Five charged Katz, Sherman,

Schwartz and Sawchuk with substantive narcotics offenses. Counts Five through Eight charged Schwartz with the possession of a firearm in violation of Title 26, United States Code, Section 5861.

On November 8, 1973 Simons withdrew his previously entered not guilty plea and pleaded guilty to Count One.* On January 17, 1974, Judge Frankel sentenced Simons pursuant to 18 U.S.C. § 4208(b), for a period of observation and study as described in 18 U.S.C. § 4208(c).

After the study had been concluded and its results furnished Judge Frankel, Simons was returned for resentencing on May 13, 1974. The imposition of sentence was suspended and Simons was placed on three years' probation. A special condition of probation was that Simons enroll in the residential drug treatment program administered by Odyssey House, and that he remain in that program until deemed eligible for release by those in charge.

On May 31, 1974, John T. Connolly, the Chief Probation Officer of the United States District Court, filed a petition before Judge Frankel alleging that Simons had violated the terms of his probation and praying for the issuance of a bench warrant. The petition recited that "the defendant violated the special condition of his probation by not being able to remain at Odyssey House and causing his own dismissal on May 13, 1974." Judge Frankel ordered the issuance of a bench warrant that same day.

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* Schwartz pleaded guilty to Counts 1, 2, 3 and 5, received a suspended sentence and was placed on probation for a period of three years. Katz and Sawchuk each entered pleas of guilty to Count 1 and received suspended sentences; Katz was placed on three years' probation, Sawchuk on two. Gallagher and Sherman were both acquitted after a jury trial, Gallagher by the jury's verdict and Sherman by a judgment of acquittal entered by Judge Frankel after the jury was unable to agree as to her.

On June 3, 1974, Simons appeared before Judge Frankel and admitted the violation of the terms of his probation. He was thereupon sentenced to a term of four years' imprisonment pursuant to 18 U.S.C. § 4208(a)(2), to be followed by a special parole term of three years.

On July 14, 1975, Simons moved, pursuant to 28 U.S.C. § 2255, to vacate the sentence imposed upon his violation of probation (A-11-A-12).* Judge Frankel, in a memorandum order filed August 8, 1975, denied the motion. (A-6-A-7).

## ARGUMENT

### POINT I

### Simons knowingly and intelligently admitted violating the terms of his probation.

Simons raises several claims concerning his state of mind during the revocation hearing.** He argues that he was under sedation, that he was unaware that he was likely to be sent to prison, and that Judge Frankel made an inadequate effort to determine his mental condition. An examination of the two page affidavit Simons submitted in support of the petition (A-11-A-12) discloses that none of these issues was raised below, except in the most

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* "Br." refers to appellant's brief; "A" refers to appellant's appendix.

** The Government objects here, as it did below (A-13) to the form of this proceeding. Although Simons' application was styled a § 2255 petition, it bore the docket number of his original criminal case. This Court has stated that a § 2255 proceeding is an independent civil suit, not an adjunct to the original criminal proceeding. *United States* v. *Huss*, 520 F.2d 598, 603 (2d Cir. 1975). Although Judge Frankel apparently agreed with the Government's objection (A-6), he nevertheless proceeded to address the merits of the application.

oblique fashion.* Consequently, neither the Government's answering papers (A-13-A-18) nor Judge Frankel's memorandum (A-6-A-7) addressed in detail the question of Simons' mental capacity at the time of the revocation proceeding. While Simons' failure to air these issues below would itself suffice to bar their consideration here, we nevertheless believe that the issues can be disposed of here because their respective lack of merit is so clear.

It is well settled that district courts need not entertain § 2255 petitions that contain no more than a "bald allegation of mental incompetence" at the time of plea. *United States* v. *Miranda*, 437 F.2d 1255, 1258 (2d Cir. 1971); *Sasser* v. *United States*, 452 F.2d 1104, 1106 (9th Cir. 1972); *Alfano* v. *United States*, 326 F. Supp. 792, 794 (D. Conn. 1971) (Timbers, D.J.). More importantly, the transcript of the revocation proceeding discloses that the fact of Simons' "mild" sedation was brought to Judge Frankel's attention (A-22), that Judge Frankel specifically inquired about the nature of the sedation, and that the following colloquy ensued:

> "The Court: More importantly, you do feel aware enough of the situation, the grim situation and the circumstances?
>
> Defendant Simons: I understand, your Honor. I am very regretful of the incident in Odyssey House, and it happened and I will have to be put somewhere else, I recognize that." (A-23).**

Further evidence of Simons' awareness can be found throughout the transcript of the revocation proceeding.

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* Simons has at all times in these proceedings been represented by counsel.

** At the revocation proceeding Simons' counsel also noted that "[t]he defendant is under sedation, but he says that that in no way interferes with his understanding what is going on at the present time." (A-22).

It is, we submit, plain that Simons' responses were intelligent, informed, and articulate, and leave no doubt that he knew where he was and what he was doing. It has been held that a determination of competence can be made from an analysis of the allocution between Court and defendant at the time of plea. *Falu* v. *United States*, 308 F. Supp. 1051, 1052 (S.D.N.Y.), *aff'd*, 421 F.2d 687 (2d Cir. 1969); *Davenport* v. *United States*, 301 F. Supp. 1033, 1034 (C.D. Cal. 1969). The record here provides a more than adequate basis for such determination.*

There is equally little merit in the contention that Simons was unaware of the consequences of admitting to a violation of the terms of his probation, and specifically that he did not know that he faced a prison term. The record is replete with references to the inevitability of Simons being placed in custody. Judge Frankel stated, "I am disposed to think that we ought to impose a custodial sentence on Mr. Simons now or in the very, very near future." (A-24). Simons stated twice that "I recognize that I am in need of residential treatment." (A-24, A-26). Moreover, Simons and Judge Frankel engaged in an extended discussion concerning his eligibility for parole and the powers and function of the Parole Board. (A-26-A-29). Judge Frankel reminded Simons of the limited nature of the Court's function in imposing sentence and stated "I will not remind you that I am sentencing you as a Judge and not treating you as a therapist." (A. 29). In light of this, we think there can be no doubt that Simons was well aware that he was facing a term of incarceration.**

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* Simons also informed Judge Frankel that, aside from the tranquilizer he had taken, he had not used any drugs in the preceding seven months. (A-35-A-36).

** In imposing sentence Judge Frankel did recommend that Simons serve his period of incarceration at the federal hospital facilities at Springfield, Missouri (A-36). Contrary to Simons'

[Footnote continued on following page]

## POINT II

### The trial court's decision to revoke Simons' probation was proper.

Simons claims that the charge to which he pleaded guilty formed an insufficient basis for revoking his probation. It is undisputed that the judgment of conviction, filed May 13, 1974 (A-9) required, as a condition of probation, that Simons be enrolled in the residential treatment program of Odyssey House. The petition presented to Judge Frankel by Probation Officer Connolly on June 3, 1974 recited that "the defendant violated the special condition of his probation by not being able to remain at Odyssey House and causing his own dismissal on May 1[illegible] 1974." * That petition announced the charge that Simons faced at the revocation proceeding.

Underlying Simons' argument appears to be two assumptions, equally flawed. One is that the charges brought in a probation revocation proceeding must be drawn with the specificity of an indictment. The other is that an activity as innocuous as failing to remain in a drug treatment center is not heinous enough to give rise to a violation of probation.

A probation revocation proceeding is not a formal trial. *United States* v. *Francischine*, 512 F.2d 827, 829 (5th Cir. 1975). It need not be initiated by formal pleadings, *Jianole* v. *United States*, 58 F.2d 115, 116-117 (8th

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current suggestion that the court's recommendation was utterly ignored and that "he was sent to Danbury Prison" (Br. 2), a review of the appropriate court and government records, which are contained in the Probation Department's file but are not a part of this record on appeal, would disclose that Simons was, indeed, initially incarcerated at Springfield, Missouri and only thereafter at Danbury.

* Although that petition is not reproduced in Simons' appendix, it does comprise part of the record on appeal.

Cir. 1932), and the rules of evidence need not be strictly observed, *United States* v. *Francischine*, *supra*, at 829; *United States* v. *Cates*, 402 F.2d 473 (4th Cir. 1968). The termination of probation is a matter entrusted to the sound discretion of the trial judge, *United States* v. *Nagelberg*, 413 F.2d 708, 709-710 (2d Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970), and the focus of his inquiry is on whether the conduct of the probationer has met the conditions of his probation. *United States* v. *Strada*, 503 F.2d 1081, 1085 (8th Cir. 1974); *United States* v. *Garza*, 484 F.2d 88, 89 (5th Cir. 1973); *United States* v. *Markovich*, 348 F.2d 238, 241 (2d Cir. 1965). The conduct that violates the terms of the probation need not be criminal. *Brown* v. *Warden, U.S. Penitentiary*, 351 F.2d 564, 567 (7th Cir. 1965), *cert. denied*, 382 U.S. 1028 (1966), and may consist, for example, in failing to make restitution, *United States* v. *Carfora*, 489 F.2d 354 (2d Cir. 1973), *cert. denied*, 417 U.S. 909 (1974), or failing to maintain alimony payments, *United States* v. *Wilson*, 469 F.2d 368 (2d Cir. 1972).

Here, although Simons' conduct was certainly not criminal, it indicated an inability to comply with the terms of the probation imposed by Judge Frankel. Residence in Odyssey House was the condition of probation imposed, and Simons admitted to Judge Frankel that he had brought about his own dismissal. At no time did Simons or his lawyer dispute the accuracy of the charge contained in Probation Officer Connolly's petition. Simons' understanding of, and acceptance of the charges brought by the Probation Department is revealed in the following exchange:

> Mr. Mitchell: Your Honor, I think in order to protect the record the defendant technically would be entitled to a hearing on his violation of probation. He stood ready to admit to the charges. I think to protect the record both for myself and your Honor if the Clerk would read the charges he

would admit his specification, having consulted with me, and that would obviate any possibility at a later date of him saying he didn't get a hearing on it.

The Court: All right. Do you understand that, Mr. Simons?

Mr. Simons: Yes.

The Court: The charge is very simply, I don't even need bother the Clerk for this, that you have technically violated, as this thing says——

Defendant Simons: Caused my own dismissal.

The Court: More correctly be unable to fulfill the special condition of probation in that you have not been able to remain at Odyssey House for treatment of the kind that they had hoped they could give you but discovered they couldn't give you, and I take it that in this conversation you have agreed that that is correct.

Defendant Simons: Yes, your Honor, but I think that——

Mr. Mitchell: Don't qualify it.

Defendant Simons: I won't qualify it. I just think after I have been at Springfield for a while I will be ready to return to Odyssey House if they would be willing to accept me.

Mr. Mitchell: That has nothing to do with it.

Defendant Simons: I am not disputing the charge. (A-32-A-33).

Simons thus conceded that he had not abided by the terms of probation Judge Frankel imposed, and that is the only finding necessary in a revocation hearing. *United States* v. *Strada, supra.* Furthermore, to argue, as Simons

does (Br. 6), that Judge Frankel "imprisoned" him for mental illness is disingenuous. Judge Frankel was aware, as were all of the participants in the hearing, that Simons had serious psychiatric problems. Judge Frankel had initially thought treatment at Odyssey House to be a suitable solution to those problems. It evidently was not, and Judge Frankel thereupon concluded, as he stated at the hearing, that Simons required custodial care. It was entirely appropriate, therefore, for Judge Frankel to commit Simons to the psychiatric facilities of the Bureau of Prisons. Simons has not claimed that he has not received psychiatric care during his incarceration, nor has he claimed that the care has been inadequate.*

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* In his brief, Simons asserts that "[i]mprisonment for mental illness is clearly illegal. In such situations the court has an obligation to see that the mentally ill person is hospitalized, not imprisoned." The first of the cases he cites for that proposition, *Overholzer* v. *Lynch*, 288 F.2d 388 (D.C. Cir. 1961), *reversed*, 369 U.S. 705 (1962), holds only that those not guilty of crimes charged by reasons of insanity should be hospitalized, not imprisoned. Simons has never claimed that he was not mentally responsible for the crime to which he pleaded guilty, and *Lynch* is thus inapposite. Nor has Simons claimed, or is there reason to believe, that his psychiatric problems rendered him incompetent to be sentenced. The second case Simons cites, *United States ex rel. Curtis* v. *Otis*, 344 F. Supp. 728 (S.D.N.Y. 1972) is similarly inapposite, and in any event was reversed by this Court not, as Simons reports, affirmed. *United States ex rel. Curtis* v. *Zelker*, 466 F.2d 1092 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973).

Mention should also be made, briefly, of Simons' claim that the sentence imposed by Judge Frankel was excessive and constituted cruel and unusual punishment. The sentence was within the statutory limits, and this Court has held that one whose probation has been revoked cannot complain of a sentence that could have been imposed originally upon his plea of guilty. *United States* v. *You*, 159 F.2d 688, 689 (2d Cir. 1947). *Genet* v. *United States*, 375 F.2d 960, 962 (10th Cir. 1967).

## POINT III

### The trial court's reconsideration of its original sentence imposed pursuant to 18 U.S.C., § 4208(a)(2) and refusal to alter that sentence were proper.

In the petition submitted in the District Court, Simons claimed that Judge Frankel had imposed a sentence under 18 U.S.C. § 4208(a)(2) unaware that Parole Board guidelines often prescribe minimum sentences in excess of one-third of the sentence imposed, *United States* v. *Slutsky*, 514 F.2d 1222 (2d Cir. 1975). In *Slutsky* this Court concluded that the sentencing judge may have been unaware of the Parole Board's policies concerning § 4208(a)(2) sentences, and remanded an appeal from the denial of a Rule 35 motion so that he could reconsider his sentence in light of those policies. Accordingly, in the case at bar, the Government informed Judge Frankel that it had no objection to a reevaluation of Simons' sentence (A-17). In his memorandum opinion, Judge Frankel stated that he had, at the time of sentencing, been aware of the imperfections attendant upon the § 4208(a)(2) sentence. He further stated that he had reviewed the sentence nevertheless and declined to alter it.* *Slutsky*, we submit, requires no more.**

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* Simons' assertion that Judge Frankel chose not to reconsider his sentence (Br. 7) is thus flatly contradicted by Judge Frankel's memorandum opinion.

** Although it is concededly irrelevant to the disposition of this appeal, we wish to note that a search of Simons' file in the Southern District's Probation Office disclosed a "Notice of Action" from the Board of Parole, dated October 31, 1975, fixing Simons' release date as January 12, 1976.

## CONCLUSION

**The order of the District Court should be affirmed.**

Respectfully submitted,

THOMAS J. CAHILL,
*United States Attorney for the Southern District of New York, Attorney for the United States of America.*

JEREMY G. EPSTEIN,
JOHN C. SABETTA,
*Assistant United States Attorneys, Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK)

Jeremy G. Epstein, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 1st day of December, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Bradley B. Davis, Esq.
1235 Park Avenue
New York, NY 10028

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jeremy G. Epstein

Sworn to before me this
1st day of December, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977